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In The
Supreme Court of the United States
October Term 1996

SERGIO MAURI,
Plaintiff-Petitioner,

v.

The CITY OF PORTLAND, et al,
Defendants-Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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80 pp

QUESTION PRESENTED FOR REVIEW

Given the purposes underlying the Civil Rights Act and the Civil Rights Attorney's Fees Awards Act, can an illegal entry by police into a residence and the resulting jury verdict of intentional infliction of emotional distress and an unjustified assault and/or battery by the police, be deemed as a matter of law solely a "common law wrong", involving no civil rights violation?

PARTIES OF INTEREST

Plaintiff

Sergio Mauri, Personal Representative of the Estate of Noraida Mauri

Defendants-Respondents

Eric D. Reiter

John C. Eckhart

William Walker

Nadine L. Bunch

Ernie F. Carneau

William M. Pace

Terry Lorz

Defendants

Michael Steven Smith

Capitol Investigation Company, Ltd.

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THE AVAILABILITY OF ATTORNEY'S FEES IN OREGON STATE COURTS AFTER *OREGON STATE POLICY OFFICERS ASSOCIATION v. STATE OF OREGON*, 27 Willamette Law Rev. 381 (1991) 23

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon appears as *Mauri v. Smith*, 135 Or App 662, 901 P2d 247 (1995). That decision is set forth in the appendix hereto (A-1 to A-37).

JURISDICTION

On February 13, 1996, the Supreme Court of the State of Oregon issued an "Order Allowing Review" agreeing to review *Mauri v. Smith* only as to the state law right of privacy holding therein and declining to review the Oregon Court of Appeals' reversal of an award of attorney's fees to Petitioner under 42 USC § 1988. The Oregon Supreme Court's order renders the Oregon Court of Appeals' decision final as it pertains to 42 USC § 1988 attorney's fees. This Court has jurisdiction pursuant to 28 USC § 1257(a).

APPLICABLE CONSTITUTION AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. * * *'

42 USC § 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

The Civil Rights Attorney's Fees Awards Act of 1976 (the "Fees Act"), amended 42 USC § 1988 to provide that:

> "In any action or proceeding to enforce a provision of section [1981, 1982, 1983, 1985

> and 1986 of this title] the court in its discretion may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs."[1]

STATEMENT OF THE CASE[2]

Mr. Mauri was the manager of the low-income federal housing project where he lived. He did a good job and was proud of his position. He was respected by the tenants and his neighbors. On a Sunday evening in July 1988, Mr. and Mrs. Mauri were relaxing upstairs in their apartment after dinner watching television. Their son (Junior) was asleep downstairs in the living room on the couch. Defendant Smith, a process server,

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[1] Notwithstanding the discretionary language of 42 USC § 1988, an award of attorney's fees normally is mandatory in a claim covered by the Fees Act *i.e.*, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Hensley v. Eckerhart*, 461 US 424, 433 (1983); [quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 US 400, 402 (1968)].

[2] The facts in the Oregon Court of Appeals' decision while detailed and generally accurate, are supplemented here. The facts recited here appear in the briefs below.

arrived at the apartment to serve a small claims court complaint. Smith, apparently agitated by not receiving a response to his initial knocking, began pounding on the Mauris' door yelling racist slurs, *e.g.*, "Black nigger, open that door.[3]

The Mauris testified that Mr. Mauri did not want Smith in the apartment. When Mr. Mauri came to the door, defendant Smith attempted to enter the apartment, stating that he was a police officer or "marshal". Mr. Mauri asked for identification from Smith and barred Smith entrance when Smith would not produce identification. Smith retreated and threatened "I'm going to call my supervisor so they can come and kick your ass."

Due to the commotion, a neighbor came out of her apartment. Smith told her he was the police

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[3] The Mauris immigrated to the United States from Cuba, a police state, in the 1960's.

and directed her to call "911". When the first officer arrived, Smith was in a nearby telephone booth, and Mr. Mauri was outside his apartment and the situation had quieted. Instead of defusing the situation, the officers talked with Smith and brought him back up to the Mauris' door, whereupon Mr. Mauri asked the officers to keep Smith away from the apartment.[4]

Then, as Mrs. Mauri described it, an officer

> "grabbed the paper out of his [the process server's] hand. My husband want to talk to the officer. The officer ignore my husband and they came, by that time it was two officers. They came into my apartment."

In the living room, an officer threw the complaint in the face of Mr. Mauri's son (with whom the police had had prior altercations) and

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[4] In Oregon, service could have been accomplished in this case by leaving the complaint and summons at the front door with Mr. Mauri ("substituted service"). Oregon Rules of Civil Procedure 7 D(2)(b). Personal service on Mr. Mauri's son was not necessary.

yelled "[N]ow you have been served, motherfucker."[5]

Despite Petitioner's instruction to keep Smith away, and knowing Smith's presence would create problems, the officers allowed Smith to accompany them into the living room and vilify the Mauris with racists slurs and profanities. Smith then challenged Junior to a fight, and Junior chased Smith out of the apartment. The police, in turn, chased Junior, and all (except Smith) soon re-entered the apartment.[6]

More police arrived on the scene and, Mrs. Mauri explained, one officer ran around "throwing

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[5] The summons was, in fact, supposed to be served on Petitioner, not his son. The police just did not bother to determine who was to be served before entering the apartment. Moreover, the Portland police do not serve summons; the county sheriff has a civil division which performs that function.

[6] Junior was arrested for "assaulting" a police officer because he brushed by the officer standing next to the door while in the process of chasing Smith. In the criminal case, the jury found Junior not guilty of the assault, but guilty of the resisting arrest charge.

my plants down". Mr. Mauri said he used "respectful words" as he implored the police, "please, no more breaking out things." Mr. Mauri described being beaten by the police with nightsticks. Petitioner was then arrested for interfering with a police officer. He in no way resisted arrest.[7] At the trial of *Mauri v. Smith*, Petitioner expressed his shame at having his pants pulled down by officers, while handcuffed, just before being paraded to a police car.

The neighbors testified that they saw Mr. Mauri with his pants down being dragged by officers to the car. "Everybody was telling the cops to pull his pants up", explained one

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[7] The actual arrest of Petitioner was a minor, descrete segment of this melee. The arrest occurred after the officers' use of their nightsticks on the Mauris and the damaging of their belongings. Mr. Mauri was charged with resisting arrest and interfering with a police officer. He

witness, "and one of the cops yelled out and told 'the niggers' to shut up." Some eleven officers were present at this scene; counsel for Smith characterized the situation as a "near riot". Petitioner's evidence was that the police exacerbated the situation, from one in which the process server could have been escorted away to the resulting melee.

Since the Mauris did not invite the officers into the apartment, one officer testified that the police would have needed a warrant or exigent circumstances to enter the apartment. Neither existed. In fact, the officers testified that they never entered the apartment.

Petitioner's lawsuit against the officers alleged claims for assault and battery, invasion of privacy, intentional infliction of emotional

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was found not guilty of resisting arrest in the criminal case.

distress and the resulting violation of 42 USC § 1983. Petitioner sought to recover his attorney's fees under 42 USC § 1988. In his section 1983 claim, Petitioner alleged that the acts of the officers consisted of beatings, assault and intimidation and excessive force during his arrest.

At trial, the officers' counsel explained to the trial court:

> "Judge, * * * We have an extreme distance between the versions of the event that the jury needs to decide. * * * we [the officers] do not contend that if the Mauris are correct in their version of the events, the Fourth Amendment was violated. * * * if this expert is going to say that, it is entirely unnecessary, that's conceded by the City."

The police thereby conceded that a jury determination against them would establish a civil rights violation.

The jury was given a verdict which required them to decide whether the police committed an assault or battery "without justification"[8] on Petitioner, intentionally inflicted emotional distress or used excessive force in 'arresting' Petitioner. The jury found no excessive force during the actual arrest (understandable because of Mr. Mauri's cooperation), however, it awarded Petitioner $500 damages for an assault or battery "without justification" by the police, and awarded Petitioner $40,000 on his intentional infliction of emotional distress claim against the police.

Based on the findings of the jury as to the conduct and behavior of the police, the trial

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[8] The trial judge rejected the plaintiff's proposed jury verdict form which asked specifically if the plaintiffs' civil rights were violated and then, with the concurrence of counsel, wrote and gave the jury the following question which applied to the common law assault or battery claim and to Petitioner's civil rights claim: "Did one or more of the defendant Portland police officers, without justification, commit an assault or battery against Sergio Mauri, Sr.?"

judge ruled as follows with respect to Petitioner's request for attorney's fees under section 1988:

> "[I]t is difficult to visualize that the assault that the jury found was committed on Mr. Mauri could have been such an assault that it would not be a violation of his rights under §1983. * * *[s]o for that reason I'm going to allow Mr. Mauri's claim for attorneys' fees."

The Oregon Court of Appeals reversed the award of attorney's fees. *Mauri v. Smith*, 135 Or App 662, 667, 901 P2d 247 (1995). This decision was rendered despite the admission by the police that Petitioner's proof of his version of the events would constitute a Fourth Amendment violation and the trial court's finding that the events constituted a civil rights violation.[9] The

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[9] Because the trial court is well suited to make the partially subjective findings necessary for an award of attorney's fees under 42 USC § 1988, the award or denial of fees is reviewed for an abuse of discretion by the trial court. *Ackerley Communications v. City of Salem, Oregon*, 752 F2d 1394, 1396 (9th Cir. 1985); *also*

Oregon Supreme Court declined to review the attorney's fees issue. *See* Order Allowing Review, App B-1 to B-2.

ISSUE RAISED IN LOWER COURTS

On appeal, the police assigned error to the trial court's award of attorney's fees to Petitioner under 42 USC § 1988. Consequently, the Oregon Court of Appeals has addressed the attorney's fees question presented for review by this Writ. In Sergio Mauri's Brief to that court, he relied on *Ware v. Reed*, 709 F2d 345 (Fifth Cir. 1983), which explains that an unjustified assault by police constitutes a civil rights violation as a matter of law. *Ware* at 351.

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see Libby v. Illinois High School Association, 921 F2d 96, 98 (7th Cir. 1990). The Oregon Court of Appeals reversed the finding of the trial judge without an explanation as to why the finding was an abuse of discretion.

In the Oregon Court of Appeals, Petitioner argued that:

> " * * * the jury was instructed as to what constitutes a civil rights violation and returned the verdict that the officers committed an assault or battery and intentionally inflicted emotional distress on Plaintiff. The verdict establishes Plaintiff as the prevailing party. The right to be free from an unauthorized entry and assault without justification and abuse by police is the constitutionally protected right involved here."

The Oregon Court of Appeals opinion notes that police hit Petitioner and his wife with nightsticks, ignores that they pulled Petitioner's pants down, and recites that:

> "(1) two uniformed officers, entered the Mauris' home without an express invitation or a warrant, but without any objection by the Mauris; (2) in entering the apartment, the officers were well aware of the earlier altercation between Senior and Smith; (3) nonetheless, and over Senior's express objections, the officers permitted Smith to enter the apartment; (4) [officer] Reiter, while standing in the Mauris' living room, and in Senior's presence, threw the summons and complaint in Junior's face, saying, "Now

> you have been served, motherfucker"; (5) the officers stood by and did nothing while Smith vilified the Mauris, including Senior, his son, and his mother, in their own home." *Mauri v. Smith at 675;* App A-27-28.

In reversing the trial court award of 42 USC § 1988 attorney's fees,[10] the Oregon Court of Appeals explains:

> "Our holding turns on the manner in which [Petitioner's] civil rights claim was framed * * *. The second interrogatory pertained solely to [Petitioner's] common law assault or battery claim and thus could not provide the basis for liability under section 1983."

Petitioner sought review by the Oregon Supreme Court and presented to that court the issue of whether a verdict of outrageous conduct by police, including an unauthorized entry into a

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[10] The trial court directed a verdict for all defendants as to the Mauris' invasion of privacy claim, and therefore that claim did not reach the jury. The Oregon Court of Appeals reversed the trial courts privacy ruling as to the process server, but not as to the police. On the Mauris' request, the Oregon Supreme Court has taken review of whether the Mauris' privacy claim against the police should have been submitted to the jury. Order Allowing Review, App B-1.

home and an unjustified assault or battery, could be deemed solely a common law wrong with no civil rights violation involved (Petition for Review, pp 1-3, 12-19). Petitioner seeks review of that precise question by this Court.

ARGUMENT

Since Reconstruction, state judiciaries have exhibited an unwillingness to enforce rights protected by the federal Constitution.[11] Whether Oregon's judiciary should and will adhere to the basic tenets of civil rights law, or may retreat to a provincial approach already rejected by this Court, poses an important question.

42 USC § 1983 emerged from Section 1 of the Civil Rights Act of 1871. Congress enacted that statute in response to Reconstruction lawlessness, seeking to enhance the availability

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[11] *Developments in the Law - Section 1983 and Federalism*, 90 Harvard Law Review 1133, 1150 (1977).

of remedies for a deprivation of federally protected rights. *Mitchum v. Foster*, 407 US 225, 238-42 (1972). Proponents of the legislation observed that state courts were not acting to stop deprivations of civil rights and perhaps acted "in league with those who were bent on abrogation of federally protected rights." *Id.* at 240. In this context, the Civil Rights Act represented a necessary and critical expansion of federal power.

The 42 USC § 1983 federal remedy against persons who violate a person's civil rights under color of state law essentially lay dormant until *Monroe v. Pape*, 365 US 167 (1961) ("*Monroe*"). In *Monroe*, police entered the plaintiffs' home without a warrant, routed them from bed and made them stand naked in the living room while ransacking the house - facts strikingly similar to the present case.

The *Monroe* court rejected the 90 year old assumption that had elevated form (police do not act under color of law when they violate the law themselves) over substance (the police terrorized and assaulted the plaintiffs without justification). In his concurring opinion in *Monroe*, Justice Harlan attributed to the 42nd Congress:

> "* * * the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though **the same act may constitute both a state tort and the deprivation of a constitutional right.**" (emphasis added).

This Court recognizes that 42 USC § 1983 exists to provide a remedy where state law is inadequate or when a state remedy, though adequate in theory, is unavailable in practice. *Zinermon v. Burch*, 494 US 113 (1990).

Congress declared that the Fees Act is to promote the private enforcement of the Civil Rights Act and constituted an integral part of that statutory remedy:

> "* * * fee awards have provided an essential remedy if citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong. 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5911.

Congress commented:

> "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the effective remedy of fee shifting in these cases." S. Rep. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Admin. New 5908, 5913.[12]

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[12] This Court has recognized that entitlement to attorney's fees under 42 USC § 1988 "is part of the § 1983 remedy whether the action is brought in federal court or state court." *Maine v. Thiboutot*, 498 US, 1, 11 (1980). Moreover, a state court may not frustrate congressional intent and must afford a litigant the full benefit of federal law when adjudicating federal rights. *Felder v. Casey*, 487 US 131, 144, 151 (1988). The protection of federal civil rights is so important that even where a plaintiff prevails on a non-civil rights claim, which is pendant to a civil rights claim, and arises out of a common nucleus of operative

In Evaluating Petitioner's Civil Rights Claim, The Oregon Court Departs From The Congressional Intent Underlying The Civil Rights Act And Fees Act By Ignoring The Substance Of The Police Officers' Conduct.

This case does not involve inconsequential behavior or a trivial dispute between two private parties. In Oregon, the elements of the tort of 'intentional infliction of emotional distress' are: (1) the defendant intended to inflict severe mental distress; (2) the defendant's act in fact caused severe mental or emotional distress; and (3) the defendant's actions constituted an extraordinary transgression of socially tolerable conduct or exceeded any

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facts, and the civil rights claim is not adjudicated, attorney's fees must be awarded under 42 USC § 1988. *Maher v. Gagne*, 448 US 122, 132 n. 15. This "operative facts" rule prevents state courts from only reaching a state law claim alone as a mechanism to prevent an award of attorney's fees under section 1988.

reasonable limit of social toleration. *Mauri v. Smith*, 135 Or App at 673; App A-23-24.

The Oregon Court of Appeals held that the jury was entitled to conclude that the officers' conduct was so exceptional, so egregious, so extreme and outrageous, and so far beyond the farthest reaches of socially tolerable behavior that the Petitioner had established the elements of the tort. *Id.* at 675, 676; App A-28-29.

The Oregon court emphasized that the officers' conduct was intolerable because it was committed in the Petitioner's home. *Id.* at 676; App A-30. Additionally, the jury found that the police committed an assault or battery "without justification" on Petitioner. The jury was not asked the question, "Did the police violate Mr. Mauri's civil rights?" The defendants objected to plaintiffs' verdict form which specifically

included such a question and submitted their own verdict form which was used.

As the trial judge ruled, however, it is difficult to imagine how this did not amount to a civil rights violation by these police. The verdict as a whole represents a determination of police behavior which has crossed the line from common law torts to the very abuse of power which constitutes a civil rights violation.

The Oregon Court of Appeals' tact here was to focus on a single question in the verdict form - where the jury found an assault or battery "without justification" by police - and to declare that finding to be only a state common law determination. The Oregon Court of Appeals ignores the teaching of *Monroe* that the same act may constitute a state law tort and a civil rights violation. The Oregon court would have us

believe that the verdict does not represent a finding that the police abused their power.[13]

The Civil Rights Act exists to prevent state courts from making such crimped characterizations and attaching narrow labels to abusive police conduct. The Oregon court invented a way to convert a most egregious civil rights violation into a common law assault.

Mauri v. Smith represents more than a tacit abrogation by the Oregon courts of a duty to protect federally guaranteed rights. Given these striking facts, the machinations of the court below to eliminate a civil rights claim reveals that the Oregon appellate courts have become openly antagonistic to the word and spirit of

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[13] The Oregon Court of Appeals does not know precisely what the jury considered to be the assault "without justification". It could have been the beating of Petitioner before he was under arrest or the pants episode after he was handcuffed or both.

Congress and this Court embodied in 42 USC §§ 1983, 1988, *Monroe v. Pape* and its progeny.

Review By This Court Is Important Because Oregon Continues To Retreat From The Federalism Inherent In The Civil Rights Act.

The *Mauri v. Smith* decision is Oregon's second significant volley in its battle to dissuade citizens from obtaining relief under 42 USC § 1983 in Oregon state courts. The Oregon Supreme Court has already been severely criticized for its opinion in *Oregon State Police Officers Assoc. v. State*, 308 Or 531, 783 P2d 7 (1989), *cert den*, 498 US 810 (1990) in which it reversed an award of attorney's fees under 42 USC § 1988. *See* THE AVAILABILITY OF ATTORNEY'S FEES IN OREGON STATE COURTS AFTER *OREGON STATE POLICY OFFICERS ASSOCIATION v. STATE OF OREGON*, 27 Willamette Law Rev. 381 (1991).

The focus of the criticism of the *Oregon State Police* decision is that (a) the Oregon Supreme Court did not apply federal law to determine the civil rights attorney's fees issue; (b) Oregon should not develop policies inconsistent with the purpose of 42 USC § 1983; and (c) the decision is contrary to *Felder v. Casey*, 487 US 131, 151 (1988) (the supremacy clause imposes on state courts a duty to proceed so that the substantial rights of the parties under controlling federal law are protected). *Id.* at 396.

After emphasizing that the Oregon Supreme Court's state "primacy" position regresses from the federalism of the Civil Rights Act, the author makes this dramatic suggestion:

> "If a plaintiff has a strong state law claim, as well as a section 1983 claim, it would border on malpractice for the attorney to litigate the case in an Oregon state court because the attorney would be

> foregoing the potential recovery of attorney's fees for the plaintiff." *Id.* at 403.

Congress intended that a plaintiff is to have a viable choice between whether to file a civil rights action in federal or state court. The Oregon court's agenda, however, is to push all civil rights claims into the federal forum. In an Oregon state court, if a plaintiff proves a civil rights violation, the analysis is whether the plaintiff's invocation of 42 USC § 1983 was necessary, and if it was not, attorney's fees will not be awarded. That is the *Oregon State Police Association* decision.

Furthermore, if an Oregon plaintiff proves the elements of a civil rights violation[14] and

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[14] *i.e.*, an illegal entry by police officers acting under the color of law, racially motivated, resulting in unjustified beating and other intentional outrageous conduct.

common law torts[15], the Oregon courts will undertake to disregard the elements constituting a civil rights violation and restrict the verdict to the state common law claim as the basis for recovery resulting in a denial of an award of attorney's fees. That is *Mauri v. Smith*.

If a plaintiff who succeeds in proving the operative facts of a civil rights violation can nevertheless be denied the benefit of sections 1983 and 1988 because of such state court perfidy, substantive claims will no longer be brought in the state courts. This could be more costly and logistically impractical for many citizens of this state, further deterring the enforcement of these important rights.

Abusive police behavior has returned to center stage in our country and our courts should

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[15] *i.e.*, Assault and Battery, Intentional Infliction of Emotional Distress and Invasion of Privacy.

be strengthening, not limiting, the tools Congress created over a century ago to address this very problem.

CONCLUSION

Oregon can continue to move away from the Constitutional protections and mandates of the federal law. The federal courts can continue to ignore Oregon's departure. Warnings can be given to attorneys to avoid filing any potential civil rights actions in state courts. Mr. Mauri can suffer a considerable injustice and we can strike one more blow ("without justification") to Mr. Mauri.

Undoubtedly the Mauri decision will be fodder for future discussion on a state court's departure from the federal standard unless this

Writ of Certiorari is granted and the Oregon court decision reversed.

Respectfully submitted,

MOOMAW, MILLER & HILEDEBRAND

/s/ ROBERT J. MILLER, SR.

Robert J. Miller, Sr.

/s/ BRIEN HILDEBRAND

Brien F. Hildebrand
Attorneys for Petitioner

APPENDIX TO

Petition for Writ of Certiorari to the
Supreme Court of the United States

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Opinion
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APPENDIX B
Order Allowing Review
Oregon Supreme Court
February 13, 1996 . . . . . B-1

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SERGIO MAURI,	)	**CA A77516**
	)	
Plaintiff,	)	**OPINION**
	)	
v.	)	
	)	
MICHAEL STEVEN SMITH, CAPITOL INVESTIGATION COMPANY, LTD., ERIC D. REITER, JOHN C. ECKHART, WILLIAM WALKER, NADINE L. BUNCH, ERNIE F. CARNEAU, WILLIAM M. , PACE, TERRY LORZ and the CITY OF PORTLAND,	)	
	)	
Defendants.	)	

This case encompasses three appeals and a cross-appeal from a judgment that adjudicated plaintiffs[1] claims for invasion of privacy, intentional infliction of emotional distress, assault, battery, civil rights violations, and an amended appeal from a supplemental judgment for statutory attorney's fees. Those claims all arose from defendant Michael Smith's failed

arose from defendant Michael Smith's failed attempt to serve a complaint and summons on Sergio Mauri, Jr., (Junior) and from defendant police officers' ensuing actions. We affirm in part and reverse in part on the appeal of Sergio Mauri, Administrator of the Estate of Noraida Mauri, Deceased, and on the cross-appeal of Sergio Mauri, Sr. (Senior). We affirm on the appeal of defendants Smith and Capital[sic] Investigation Company, Ltd. (Capitol). We affirm on the appeal of defendant police officers Reiter and Eckhart and the City of Portland. We reverse on the appeal of defendant policy officers Walker, Bunch, Carneau, Pace and Lorz. Finally, we reverse on Portland's and the officers' appeal from the supplemental judgment awarding costs and attorney's fees.

The facts material to our review are as follows.[2] Senior, his wife, Noraida, and his son, Junior, lived together at the Celilo Court apartment complex in Portland, where Senior was resident manager. In the early evening of July 17, 1988, Smith, an employee of defendant Capitol, went to plaintiffs' apartment to serve a summons and complaint on Junior. Junior was asleep on a couch on the first floor of the apartment, and Senior and Noraida were watching television in their upstairs bedroom. When Smith knocked on the door, Noraida called from the

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[2] As amplified below, this recitation is material to our review of (1) plaintiff's contentions that the court erroneously allowed a directed verdict against their invasion of privacy claims; and (2) all defendant's contentions that the court erroneously denied their motions for directed verdicts against plaintiff's claims for intentional infliction of emotion distress. Because of that juxtaposition, we consider the evidence adduced at trial and related reasonable inferences in the light most favorable to plaintiffs. *See Lindstrand v. Transamerica Title Ins. Co.*, 127 Or App 693, 695, 874 P2d 82 (1994) (grant of directed verdict); *Sivers v. R & F Capitol Corp.*, 123 Or App 35, 37, 858 P2d 895 (1993), *rev den* 318 Or 351 (1994) (denial of directed verdict). Although the parties assign error to other ruling, our disposition of those assignments does not turn on the sufficiency of evidence.

upstairs window, "May I help you?" Smith responded that he was looking for Junior, and Noraida told him that Junior was sleeping on the couch downstairs. Smith then began pounding loudly on the door, yelling, "Black niggers open that door." When Senior went downstairs to investigate and asked Smith to identify himself, Smith said he was a police officer and tried to enter the apartment. Senior blocked his passage and a showing match ensued. As Smith was leaving, he stated that he was going to call his supervisor who would "come and kick [Senior's] ass."

Smith then went next door and asked the neighbors if he could use their telephone. When they refused, Smith used the public telephone located in front of the complex to call his employer. Meanwhile, the neighbors called 911 to report the altercation between Smith and Senior.

Shortly thereafter, defendants Portland Policy Officers Eckhart, Reiter, and bunch arrived at the apartment complex in response to the 911 call. Officer Reiter had had prior contact with Junior when Junior had threatened to kill a female fellow officer in his presence several months earlier. Reiter took the summons and complaint from Smith, and he and Eckhart approached the Mauri apartment, with Smith following. Bunch remained outside.

When They reached the Mauri apartment, Senior did not object to Reiter and Eckhart entering, but told them not to allow Smith to enter. The officers disregarded Senior's request and permitted Smith to accompany them into the apartment. Smith identified Junior, who was still lying on the couch. In Senior's and Noraida's presence, Reiter threw the summons and complaint in Junior's face and said, "Now you

have been served, motherfucker." Smith then told Junior, "You are a nigger, you motherfucker. Get up. I want to fight with you." Turning his attention to Senior, Smith exclaimed that Senior's mother was a "bitch" and that Senior was a "bigger bitch." At that point, Junior jumped up, shoved Reiter out of the way, and chased Smith from the apartment. Reiter pursued on foot, catching Junior momentarily, but Junior struck him and pulled free. After chasing Smith for some distance, Junior jumped a fence and reentered the Mauri apartment through the back door.

Eckhart and Reiter followed Junior into the kitchen with the intent of arresting him. Junior, who was extremely agitated, positioned himself in the corner of the kitchen and refused to allow the officers to arrest him. Noraida and Senior placed themselves between the officers and

Junior. Reiter, realizing that the situation was nearly out of control, called for backup. After officers Pace, Walker, Carneau, and Lorz arrived, the officers decided to arrest Junior. One or more of the officers cleared Senior and Noraida out of the way by hitting them with nightsticks. The officers arrested Junior for assaulting an officer and Senior for interfering with a police officer.

Senior, Noraida and Junior[3] brought this action against Smith, Capitol, the officers, and Portland. With respect to Smith and Capitol, the Mauris asserted claims for intentional infliction of emotional distress, invasion of privacy and assault. With respect to the officers and Portland, the Mauris asserted claims for civil rights violations under 42 USC § 1983,

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[3] Junior voluntarily dismissed his claims with prejudice before trial.

intentional infliction of emotional distress, invasion of privacy, and assault and battery.

Those claims were tried to a jury. At the close of evidence, the trial court: (1) directed verdicts for all defendants on plaintiff's invasion of privacy claims; (2) directed verdicts for Smith and Capitol on the assault claims; and (3) denied defendants' motions for directed verdicts against plaintiffs' claims for intentional infliction of severe emotional distress. Finally, the court denied plaintiff's motion, under ORCP 23 B, to amend their pleadings to include trespass claims against all defendants so as to conform to the evidence.

The jury returned special verdicts on the remaining claims. With respect to Noraida, the jury found for defendants on all claims, including her claims for intentional infliction of emotional distress against all defendant and

her claims for assault and battery and civil rights violations against the officers and Portland. With respect to Senior, the jury found that all defendants were liable for intentional infliction of emotional distress and that one or more of the officers was liable for assault and battery. However, the jury further found that the officers did not deprive Senior "of his right to be free from the excessive use of force during arrest." The jury awarded Senior compensatory damages against Portland and the officers of $500 for assault or battery and $40,000 for intentional infliction of emotional distress and awarded an additional $10,000 against Smith and Capitol for intentional infliction of emotional distress.

After the trial court entered judgments on those verdicts, Noraida appealed, assigning error to: (1) the trial court's denial of her ORCP 23

B motion to amend to add a trespass claim. All defendants appealed, the judgment for Senior, assigning error to the trial court's denial of their motions for directed verdicts against his claims for intentional infliction of emotional distress and to the ensuing judgment. Senior cross-appealed against all defendants on the same grounds asserted in Noraida's appeal. Finally, more than a year after entering its original judgment, the trial court entered a supplemental judgment for Senior against the officers and Portland, awarding attorney's fees and costs pursuant to 42 USC § 1988. Those defendants filed an amended notice of appeal from that supplemental judgment asserting that the jury's special verdict did not find a violation of 42 USC § 1983, which is the predicate for such costs and fees.

For ease of analysis, we will address, successively: (1) Noraida's estate's appeal and Senior's identical cross-appeal; (2) the appeal of defendants Smith and Capitol; (3) the appeal of defendants Portland and the officers; and (4) those defendants' appeal from the supplemental judgment.

1. Plaintiffs assert that the court erred in directing verdicts for defendants on the invasion of privacy claims. The trial court granted defendants' motions on the ground that an intrusion into a residence, without more, is not sufficient to sustain an action for invasion of privacy:

> "It just - I don't think a trespass to a residence constitutes an invasion of privacy as such, and that's what this is. I'm just not willing to create a new tort."

Plaintiffs dispute that reasoning and argue that, under Oregon decisions applying *Restatement (Second) Torts* § 652B (1977), defendants' entry

into their apartment presented a jury issue as to whether defendants' conduct constituted an invasion of privacy. *Restatement (Second) Torts* § 652B reads:

> "One who intentional intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

See, e.g., McLain v. Boise Cascade Corp., 271 Or 549, 554, 533 P2d 343 (1975); *Magenis v. Fisher Broadcasting, Inc.*, 103 Or App 555, 561, 798 P2d 1106 (1990) (both applying *Restatement (Second) Torts* § 652B formulation).

2. Thus, plaintiffs must show: (1) an intentional intrusion, physical or otherwise; (2) upon plaintiffs' private affairs or concerns; (3) that would be highly offensive to a reasonable person. *See Leggett v. First Interstate Bank of Oregon*, 86 Or App 523, 527, 739 P2d 1083 (1987).

Applying that test, and viewing he evidence in the light most favorable to plaintiffs, *Griffin v. K.E. McKay's Market of Coos Bay, Inc.*, 125 Or App 448, 451, 865 P2d 1320 (1993), *rev den* 319 Or 80 (1994), we conclude that the trial court correctly directed a verdict in favor of the officers and Portland but erred in doing so for Smith and Capitol.

3,4. We affirm the directed verdict for Portland and the officers because plaintiffs, who based their claim on the conduct of Reiter and Eckhart, adduced no proof that those officers intentionally intruded into plaintiffs' apartment. "Intrusion" necessarily connotes an *unconsented* entry. Here, there was no evidence of lack of consent, including any objection by the Mauris, or any use of force or coercion by Reiter and Eckhart. Nor did the Mauris testify that they did not object to the officers' entry

because of any fear or intimidation. Conversely, the record discloses that Senior was perfectly capable of objecting to, and barring, entry when he so chose. It is uncontroverted that, although Senior did not object to Reiter's and Eckhart's entry, he did expressly object to Smith's entry. We thus conclude that plaintiffs' proof as to the officers' conduct was insufficient as a matter of law.[4]

5. By contrast, we conclude, without further discussion, that there was proof from which the jury could have found that Smith intentionally intruded into the apartment and that the apartment was a private area. Consequently, we focused on the third element of invasion of privacy - *i.e.*, could reasonable jurors have

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[4] In so holding, we do not, of course, suggest that an express objection to entry is always prerequisite for an intrusion. For example, a residential burglary could well be an intentional intrusion.

found that Smith's intrusion into the apartment was highly offensive?

Smith and Capitol argue that the court properly granted the directed verdict because, under *McLain v. Boise Cascade Corp.*, a trespass is not, by itself, so offensive as to constitute and invasion of privacy. Defendants read too much into that case.

In *McLain*, the court held that the trial court properly granted a directed verdict against an invasion of privacy claim because no reasonable person could find that defendant's trespass on the periphery of plaintiff's property while engaging in unobtrusive surveillance activities was highly offensive behavior. 271 Or at 556. Here, Smith's trespass into an occupied apartment, over the residents' objections, is qualitatively different from an undetected technical trespass to real property. Moreover,

the court in *McLain*, itself, suggested that an intrusive trespass may constitute an invasion of privacy: "Trespass to peer in windows and to annoy or harass the occupant may be unreasonable." 271 Or at 556. Thus, *McLain* is not controlling.

The only other Oregon case pertinent to whether a residential trespass may constitute an invasion of privacy is *Magenis v. Fisher Broadcasting, Inc.*. However, *Magenis* stands for the obverse of plaintiffs' position., *i.e.*, a residential trespass is not *per se* an invasion of privacy. There, the plaintiffs moved for a directed verdict on their invasion of privacy claims, which were based on proof that the defendant television reporter had accompanied policy officers in filming a raid on their home. We affirmed the trial court's denial of that motion, stating, "[I]n determining whether the

defendant's conduct was tortious, the fact that it constituted an unlawful trespass is only one factor to be considered." 103 Or App at 562. Thus, neither *Megenis* nor *McLain* is particularly useful, and there appear to be no other pertinent Oregon decisions.

We note, however, that commentary to *Restatement (Second) Torts* § 652B does speak to whether a nonincidental residential trespass can, without more, trigger liability for invasion of privacy. *Comment b* states:

> "The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection to entering his home."

Decisions from other jurisdictions accord with that principle, holding that evidence of a trespass into a plaintiff's home or hotel room is sufficient to support liability for invasion of

privacy. For example, in *Gonzales v. Southwestern Bell Tel. Co.*, 555 SW2d 219 (Tex App 1977), the plaintiffs refused to pay the defendant a fee for two telephones located in their home. Consequently, the defendant informed them that it was terminating their service and dispatched an employee to remove the phones from the plaintiff's home. The employee, who found no one home, entered nonetheless, and removed the phones from a hallway and a bedroom. The jury returned a verdict for the plaintiffs on their invasion of privacy claim, but the trial court granted the defendant's motion for judgment n.o.v. The Texas Court of Appeals reversed, holding that the jury was entitled to find that the employee, acting as the telephone company's agent, had invaded the plaintiff's privacy by entering their home without their permission.

Similarly, in *Sowards v. Norbar, Inc.*, 78 Ohio App 3d 545, 605 NE2d 468 (1992), the defendant searched the plaintiff's motel room without his consent. The jury found that the defendant invaded the plaintiff's privacy, and the trial court denied the defendant's motion for judgment n.o.v. The Ohio Court of Appeals affirmed:

> "[T]he fact that [plaintiff's] personal property may not have been disturbed during the search does not preclude [plaintiff] from asserting an invasion of his legitimate right of privacy in the room itself." 78 Ohio App 3d at 555, 605 NE2d at 475.

6. Given Oregon courts' prior endorsement of *Restatement (Second)* § 652B, *see, e.g., McLain*, we find the principle expressed in *comment b* to that section and in analogous decisions from other jurisdictions to be persuasive. Accordingly, we conclude that plaintiffs' proof that Smith entered their home over their

objections was sufficient to withstand Smith's and Capitol's motions for directed verdicts on the invasion of privacy claims. The trial court erred in granting those motions.[5]

7, 8. Plaintiffs also assign error to the court's denial of their motions to amend their complaints pursuant to ORCP 23 B to include claims for trespass against all defendants. We review for an abuse of the trial court's discretion. *Adams v. Knoth*, 102 Or App 238, 246, 794 P2d 796, *rev den* 310 Or 422 (1990).

On the first day of trial, plaintiffs moved to amend their complaints to allege trespass. Defendants objected, and the court denied that motion, on the ground that defendants would be prejudiced by the last minute interjection of a

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[5] We note, moreover, that plaintiffs adduced proof that, after entering the apartment, Smith subjected them to racial slurs and epithets. Thus, even if plaintiffs had been obliged to show that Smith engaged in highly offensive

new claim. Plaintiffs do not assign error to that ruling. Thereafter, in trying their invasion of privacy claims, plaintiffs presented evidence of defendant's intrusion into the apartment. Defendants did not object to that evidence. At the close of all evidence, plaintiffs moved pursuant to ORCP 23 B to add trespass claims based on the evidence of defendants' entry.

ORCP 23 B provides, in part:

> "When issues not raised by the pleading are tried by *express or implied consent* of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." (Emphasis supplied.)

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conduct beyond the residential trespass over their objections, they did so.

Defendants responded that they had not expressly or impliedly consented to the interjection of trespass claims, and the trial court denied plaintiffs' motions.

We agree with defendants that the trial court's ruling was well within the bounds of discretion. The procedural history here demonstrates that defendants did not consent to the interjection of trespass claims. Having objected to and prevented such an amendment at the beginning of trial, it makes no sense that they would have acquiesced in the same amendment immediately thereafter. Instead, defendants consented to the introduction of the alleged" trespass" evidence solely for the purposes of plaintiffs' invasion of privacy claims. *See Navas v. City of Springfield*, 122 Or App 196, 201, 857 P2d 867 (1993). Thus, the trial court

correctly concluded that the prerequisites to amendment under ORCP 23 B were not satisfied.

9. We turn next to Smith's and Capitol's appeal from the judgment for Senior on his claim for intentional infliction of emotional distress. Those defendants assign error to the court's denial of their motion for a directed verdict. Accordingly, we review to determine whether there is any evidence from which the jury could have imposed liability based on Smith's conduct. *Brown v. J.C. Penney Co.*, 297 Or 695, 705, 688 P2d 811 (1984).[6]

10. To establish intentional infliction of severe emotional distress, a plaintiff must prove that: (1) the defendant intended to inflict severe mental or emotional distress; (2) the defendant's act in fact caused plaintiff severe

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[6] Plaintiffs' claims against Capitol were based solely on *respondent superior*. Capitol has never contended that Smith acted beyond the course and scope of his employment.

mental or emotional distress; and (3) the defendant's actions consisted "of 'some extraordinary transgression of the bounds of socially tolerable conduct'" or exceeded "'any reasonable limit of social toleration.'" *Patton v. J.C. Penney Co.*, 301 Or 117, 122, 719 P2d 854 (1986) (quoting *Hall v. The May Dept. Stores*, 292 Or 131, 135, 137, 637 P2d 126 (1981).

11. Smith argues that there was no evidence that his conduct exceeded any reasonable limit of social toleration.[7] In determining whether conduct is socially intolerable, we review the alleged conduct on a case-by-case basis, considering the totality of the circumstances. *Lathrope-Olson v. Dept. of Transportation*, 128 Or App 405, 408, 876 P2d 345 (1994).

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[7] Smith also argues that there was no evidence that he intended to inflict severe emotional distress on Senior or that he actually caused Senior to suffer severe emotional distress. We conclude, without further discussion, that

We conclude that there was ample evidence from which the jury could find that Smith's conduct towards Senior exceeded any reasonable limits of social toleration. Senior presented the following evidence: (1) after knocking on the Mauris' door, Smith yelled, "Black niggers open that door!"; (2) Smith falsely identified himself as a law enforcement officer and tried to enter the apartment; (3) while Senior was ejecting Smith from the apartment, Smith stated he was going to call his supervisors to "come and kick [Senior's] ass"; (4) immediately thereafter, Smith threw a rock as the Mauris' closed door; (5) after the police arrived, Smith entered the Mauri apartment over Senior's objections; and (6) while inside the apartment, after calling Senior's mother a "bitch," Smith stated the Senior was a "bigger bitch." Smith's conduct -

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there was evidence to support the jury's finding on both elements.

the combination of unconsented entry, racist comments and threatening and violent conduct directed against Senior in his own home - amply supported the jury's verdict against Smith and Capitol:

> "[O]vert acts of racism * * * are not simply rude and boorish, but are more properly characterized as the kind of conduct that a jury could find as intended to inflict deep, stigmatizing and psychic wounds on another person." *Lathrope-Olson*, 128 Or App at 408.

See also Franklin v. PCC, 100 Or App 465, 471, 787 P2d 489 (1990). We affirm that aspect of the judgment.

12. We next consider Portland's and the officers' cross-appeal. Those defendant assert that the court erred in denying their motion for a directed verdict on Senior's intentional infliction claim and in entering judgment on the jury's verdict. In particular, they argue that the evidence pertaining to the officers' conduct

was legally insufficient in two respects. First, the evidence did not disclose conduct that was so extraordinary as to exceed the bounds of social toleration. Second, they assert, Senior failed to prove that the officers intended to inflict emotional distress on him. We reject both arguments.

As delimited by its special interrogatory responses, the jury's verdict against Portland and the officers on the intentional infliction claim was based on the officers' conduct *before* Junior chased Smith from the apartment. Thus, in reviewing the sufficiency of Senior's proof, we consider the totality of the circumstances up until that time.

Viewed most favorably to Senior, that evidence shows that: (1) two uniformed officers, Reiter and Eckhart, entered the Mauris' home without an express invitation or a warrant, but

without any objection by the Mauris; (2) in entering the apartment, the officers were well aware of the earlier altercation between Senior and Smith; (3) nonetheless, the over Senior's express objections, the officers permitted Smith to enter the apartment; (4) Reiter, while standing in the Mauris' living room, and in Senior's presence, threw the summons and complaint in Junior's face, saying, "Now you have been served, motherfucker"; (5) the officers stood by and did nothing while Smith vilified the Mauris, including Senior, his son, and his mother, in their own home.

13. We conclude that the evidence was sufficient to show conduct "which a reasonable jury could find beyond the farthest reaches of socially tolerable behavior." *Hall*, 292 Or at 137. In so holding, we are mindful of the rigor of that standard and of our obligation to apply it on a

case-by-case basis. At the same time, we are mindful that the jurors, who were properly instructed on the standard of liability and who, no less than we, are familiar with the bounds of tolerable conduct in our society, determined that he officers' conduct was so extraordinary as to warrant tort liability.

In assessing the totality of the circumstances, two contextual factors seem especially significant. First, defendants were uniformed police officers. Second, the events occurred in Senior's home. The combination of those factors, coupled with the actors' particular conduct - both action and inaction - rendered that conduct so exceptional as to exceed social toleration.

14. We are neither naïve about the interactions between the police officers and the public nor unsympathetic to the extraordinary demands of

day-to-day police work. Still, police officers exercise special authority and, because of that authority, they are, in some circumstances, subject to special standards of conduct. Thus, conduct that would not be exceptionable for a private citizen may represent an extraordinary transgression by a police officer:

> "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. * * * In particular[,] police officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their position." *Restatement (Second) Torts* § 46, *comment e.*

15. The second significant contextual factor or "filter" was the location. The conduct occurred in Senior's living room. Just as our society views police officers as being special, so too do we regard our homes. We speak not infrequently of the sanctity of one's home, as a haven for

family. Thus, conduct that is tolerable - or, at least, must be tolerated - on the street, in the market place, or in the work place, may be intolerable at home.

Given those norms, the jury was entitled to conclude that the officers' conduct in the Mauris' home was so egregious as to warrant the imposition of tort liability. Regardless of whether Reiter's conduct and comments alone transgressed the bounds of social toleration, the combination of that behavior and the officers' conduct with respect to Smith certainly did. The officers not only permitted Smith's unlawful entry, notwithstanding Senior's objections and their knowledge of the earlier altercation, but they then stood by and did nothing while Smith verbally abused Senior and his family in their own home. That, in the totality of the

circumstances, was enough. *Accord Lathrope-Olson*.

16. Similarly, we reject Portland's and the officers' argument that Senior's proof was insufficient to show that the officers acted with intent to cause Senior emotional distress. Such proof of intent is almost inevitably circumstantial and inferential; few defendants admit a specific intent to inflict injury. Here, the jury could reasonably infer such and intent. In particular, the jury was entitled to infer a specific intent to inflict emotional distress from the fact that the officers knew about the earlier altercation between Senior and Smith but, nevertheless, permitted Smith to enter Senior's home unlawfully over his objections. Such conduct could reasonably be viewed as calculated to embarrass and humiliate Senior, who had previously barred Smith's entry. *See Buckel v.*

Nunn, 133 Or App 399, 405, 891 P2d 16 (1995); *Bodewig v. K-Mart, Inc.*, 54 Or App 480, 487, 635 P2d 657 (1981), *rev den* 292 Or 450 (1982).

17. Finally, five of the seven defendant officers - Walker, Carneau, Pace, Lorz, and Bunch - argue that, regardless of the sufficiency of the proof with respect to Reiter and Eckhart, the court improperly entered judgment against them for joint and several liability on Senior's intentional infliction claim. They argue that they could not be liable because the evidence shows that only Reiter and Eckhart were present in the apartment at the relevant time, as prescribed by the special verdict. We agree. Accordingly, we affirm the judgment against Portland, Reiter and Eckhart on Senior's claim for intentional infliction of emotional distress,

and we reverse the judgment against Walker, Carneau, Pace, Lorz, and Bunch on that claim.[8]

18. Finally, we address Portland's and the officers' appeal from the supplemental judgment awarding Senior attorney's fees pursuant to 42 USC § 1988, which provides:

> "In any action or proceeding to enforce a provision of § * * * 1983 * * *, of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The dispute over attorney's fees arises from confusion over whether Senior actually prevailed in his claim for civil rights violations under section 1983. That confusion, in turn, arises from a lack of precision in the special verdict form, which was crafted at the eleventh hour and was then revised, even during the jury's

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[8] Walker, Bunch, Carneau, Pace, and Lorz do not assign error to the entry of judgment against them, jointly and

deliberations, in response to the jury's questions and concerns, which pointed out deficiencies and potential inconsistencies in the special interrogatories.[9]

The special verdict form did not include an interrogatory that explicitly referred to 42 USC § 1983 or to Senior's "civil rights claims." Instead, the special verdict form posed two arguably pertinent interrogatories. *First*:

> "Indicate if any of the [defendant police officers] deprived Sergio Mauri, Sr. Of his right to be free form the use of excessive force during arrest."

The jury responded "no" with respect to each officer. *Second*:

> "Did any one or more of these defendant Portland police officers, without

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severally, on Senior's separate claim for assault or battery.

[9] This recitation is not intended as a criticism of the able trial judge, or of counsel, who were managing a complex, multi-party case under a demanding schedule. It is, instead, a description of the procedural context that gave rise to subsequent uncertainty.

> justification, commit an assault or battery against Sergio Mauri, Sr.?"

The jury responded "yes."

Senior pointed to the latter response as proof that the jury had found that some or all of the officers had engaged in conduct violating his civil rights.[10] Conversely, Portland and the officers invoked the former response. The trial court agreed with Senior and awarded him reasonable attorney fees:

> "[A]s I can best understand the spirit of the statutory scheme, Mr. Mauri, Sr. Has prevailed on the basis of his claim, although it was not squarely presented to the jury. It is difficult to visualize that the assault that the jury found was committed on Mr. Mauri could have been such an assault that it would not be a violation of his rights under Section 1983."

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[10] Portland did not dispute that, at all material times, the officers had acted under color of state law. Thus, Senior argued, the jury necessarily found that the officers had engaged in an unjustified assault or battery while acting under color of state law.

We reverse. Our holding turns on the manner in which Senior's civil rights claim was framed. After reviewing Senior's pleadings, the jury instructions on the civil rights claims (to which Senior did not except), and the special verdict interrogatory responses, we conclude that he only interrogatory that corresponded to Senior's section 1983 claim, *as that claim was pleaded and presented to the jury*, was the first interrogatory, which the jury answered in the negative. The second interrogatory, which the jury answered in the negative. The second interrogatory, which the jury answered affirmatively, pertained solely to Senior's common law assault or battery claim and, thus, could not provide the basis for liability under section 1983. *See National Organization for Women v. Operation Rescue*, 37 F3d 646, 653-54 (DC Cir 1994) (party that loses on a federal civil

rights claim, but recovers on a pendant state claim, is not a prevailing party under section 1988 and is not entitled to attorney's fees); *Mateyko v. Felix*, 924 F2d 824, 828 (9th Cir 1990), *cert den* 502 US 814 (1991) (same).

The jury instructions on Senior's civil rights claim limited that claim to the alleged use of excessive force *during* Senior's arrest. That claim, as defined by the instructions, did not encompass unjustified assault or battery occurring at any other time. Thus, to prevail on that claim, as submitted to the jury, Senior was required to prove excessive use of force during the arrest. However, as noted, the jury unequivocally found no excessive use of force during Senior's arrest. Consequently, Senior did

not prevail on his claim and could not recover attorney's fees under section 1988.[11]

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[11] Because the only physical contact Senior had with the officers was during his arrest, the two interrogatory responses might appear to be internally inconsistent. However, the second response pertained to "assault *or* battery" (emphasis supplied), and the jury instructions correctly stated that actual physical contact is not an element of assault. Consequently, the jury could have found that one or more of the officers committed assault against Senior but did not use excessive force during his arrest.

IN THE
SUPREME COURT OF THE STATE OF OREGON

SERGIO MAURI, Administrator of the Estate of Noraida Mauri, Deceased, Plaintiff-Appellant Petitioner on Review, SERGIO MAURI, Plaintiff, and SERGIO MAURI, JR., Plaintiff, v. MICHAEL STEVEN SMITH, CAPITOL INVESTIGATION COMPANY, LTD., ERIC D. REITER, JOHN C. ECKHART, WILLIAM WALKER, NADINE L. BUNCH, ERNIE F. CARNEAU, WILLIAM M. , PACE, TERRY LORZ and the CITY OF PORTLAND, Defendants-Respondents, Respondents on Review. NORAIDA MAURI, Plaintiff, SERGIO MAURI,	**MCCC No. 90-0704234** **ORDER ALLOWING REVIEW** **CA A77516** **SC S42635**

Plaintiff-Respondent/ Cross-Appellant, Petitioner on Review,	)
and	)
SERGIO MAURI, JR.,	)
Plaintiff,	)
v.	)
MICHAEL STEVEN SMITH, CAPITOL INVESTIGATION COMPANY, LTD., ERIC D. REITER, JOHN C. ECKHART, WILLIAM WALKER, NADINE L. BUNCH, ERNIE F. CARNEAU, WILLIAM M. PACE, TERRY LORZ and THE CITY OF PORTLAND,	)
Defendants-Appellants/ Cross Respondents, Respondents on Review.	)

It is ordered that cross-appellant's petition for review is allowed. Review is limited to issue number 1 as listed on page two of the petition for review.

It appears from the record on review that petitioner on review will not file a brief on the merits pursuant to ORAP 9.17(2). Respondent on review has 28 days from the date of this order to file a brief on the Merits as provided in ORAP 9.17(4)©. If respondent on review does not intend to file a brief on the merits, respondent

on review should so notify the court as soon as possible.

Oral argument will be held as soon as possible after briefing on the merits, if any, is completed. The parties will receive notification of the exact date and time of oral argument.

Date this 13th day of February, 1996.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

c: Brien Frederick Hildebrand
John S. Folawn
Stephen P. McCarthy
Harry Auerbach

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SERGIO MAURI,
Plaintiff-Petitioner,

v.

The CITY OF PORTLAND, et al,
Defendants-Respondents.

CERTIFICATE OF FILING

I, Robert J. Miller, Sr., being first duly depose and say that I am one of the attorneys for Petitioner herein. That I filed the above PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON with the Clerk of the Supreme Court of the United States on the 13th day of May, 1996, that it was placed in an envelope properly addressed with prepaid postage

thereon and deposited in the United States Post Office at Beaverton, Oregon.

/s/ ROBERT J MILLER SR

Robert J. Miller, Sr.

SUBSCRIBED AND SWORN to before me this 13 day of May, 1996.

/s/ Emilyn M. Howell

Notary Public for Oregon
My Commission Expires: 7-20-97

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON** on:

John Folawn
LANE, POWELL, SPEARS,
LUBERSKY
520 S.W. Yamhill Street
Suite 800
Portland, Oregon 97204

Harry M. Auerbach
OFFICE OF CITY ATTORNEY
1220 S.W. Fifth Avenue
Room 315
Portland, Oregon 97204

this 13th day of May, 1996, by mailing to each three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes, addressed to said individuals at their regular office addresses; and said sealed envelopes were then deposited in the United States post office at Beaverton, Oregon on the day last above mentioned with the postage thereon fully paid.

/s/ ROBERT J. MILLER SR.

Robert J. Miller, Sr.
Attorney for Petitioner